Supreme Court, U.S.
FILED
JUL 2 1997
CLERK

(3)

No. 96-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GESKE & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July 2, 1997

Balmar Legal Publishing Services, Washington, DC (202) 682-9800

14 pp

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board impermissibly expanded the rights of non-employee union organizers to engage in derivative Section 7 protected activity under *Lechmere, Inc. v. NLRB* and *Bill Johnson's Restaurants, Inc. v. NLRB*, by finding an employer's libel lawsuit against a stranger labor union is an unfair labor practice, before the state trial court resolves motions for summary judgment, but after the state trial court has both found the libel tort not preempted by federal jurisdiction and has denied the union's motion to dismiss.

2. Whether under *Lechmere, Inc. v. NLRB* and *Bill Johnson's Restaurants, Inc. v. NLRB*, the National Labor Relations Board may order reimbursement of attorney's fees and costs as a derivative Section 7 remedy in favor of a non-certified "stranger" labor union, whenever its evidentiary scrutiny finds that the employer's state tort complaint against the union is for retaliatory purposes, rather than for frivolous or illegal purposes as set forth in *NLRB v. Food Store Empl., Local 347.*

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BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Associated Builders and Contractors, Inc. ("ABC" or the "Amicus") is a national trade association representing more than 19,000 construction industry firms located in 79 chapters throughout the country. ABC members include both unionized and "open shop" firms, who share the belief that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation.

ABC strongly supports the right of contractors to compete for work without being subjected to threats, injurious

falsehoods or intimidation by outside agents, including by labor organizations. It is a fact of industrial life, however, that conflicts may occur where labor unions resort to pressure tactics which exceed the legal boundaries. Such tactics may cause harm for which there is no redress available under the National Labor Relations Act.

In these circumstances, it is a constitutionally protected right of employers to resort to the courts for protection from the destruction of their businesses. This Court recognized the importance of that constitutional right in ***Bill Johnson's Restaurants v. NLRB***, 461 U.S. 731 (1983), holding that the NLRB should not be permitted to enjoin court suits brought by employers against their own employees, except in extraordinary circumstances.

In the years since ***Bill Johnson's*** was decided, ABC is concerned that the Court's holding has been improperly transformed from a shield protecting most good faith litigation, into a sword used to punish employers who exercise their constitutional rights to petition the courts for relief. In particular, whereas ***Bill Johnson's*** restricted employers' ability to file baseless suits solely for the purpose of retaliating against their own employees, the National Labor Relations Board has sought to expand the Court's holding into a broad prohibition against suing ***unions***, regardless of whether the unions represent any of the employer's employees or are merely strangers to the workplace. Similarly, whereas ***Bill Johnson's*** was squarely grounded upon the desire to protect employee rights under Section 7 of the National Labor Relations Act, the NLRB has expanded the Court's holding into a protection of unions in general, notwithstanding the omission of labor organizations from the protections of Section 7.

The courts of appeal have not uniformly supported the NLRB's expansion of the holding of ***Bill Johnson's Restaurants***, and a conflict in the circuits has developed. Meanwhile, the NLRB has carved out a significant and unwarranted exception to the "American Rule" of litigation, at least where unions

are concerned. Employers who bring legal action against labor organizations are now faced with the prospect of having to pay the unions' attorneys fees in addition to the employers' own, in a significant departure from traditional notions of fee payments under the NLRA.

This case represents an important opportunity for the Court to clarify and limit the reach of ***Bill Johnson's Restaurants v. NLRB***. The small employer in the case, Geske & Sons, Inc. did not sue its employees or engage in any other action interfering with employee rights under Section 7 of the NLRA. Rather, the employer sought to defend its business in court against injurious falsehoods spread by an outside "stranger" labor union, which was threatening the destruction of the company. The NLRB, supported by the Seventh Circuit, enjoined the employer's state court lawsuit and ordered the payment of attorneys fees to the union for the court action.

ABC as amicus supports each of the reasons for granting the writ of certiorari set forth in Geske's Petition. ABC is submitting this brief, however, to highlight in particular the importance of the conflict in the circuits over the NLRB's expansion of the holding of ***Bill Johnson's Restaurants*** into an unwarranted fee shifting device giving unions an inappropriate advantage in civil litigation. The NLRB's holding in this case, and that of the Seventh Circuit, should be reversed.

STATEMENT OF THE CASE

ABC adopts the statement of the case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decisions of the Board and the Seventh Circuit Have Created a Conflict Within the Circuits By Imposing Unwarranted Penalties Upon Employers Who Exercise Their First Amendment Right to Seek Redress in the Courts For Harm Inflicted Upon Them by "Stranger" Labor Unions.

Section 7 of the National Labor Relations Act provides that "*[e]mployees* shall have the right to self-organization, to form, join or assist labor organizations." Section 8(a)(1) of the Act provides that it "shall be an unfair labor practice for an employer to interfere with, restrain, or coerce ***employees*** in the exercise of the rights guaranteed in section 7 [of the Act]." (emphasis added). Based upon this language, in ***Lechmere, Inc. v NLRB***, 112 S. Ct. 841 (1992), this Court reaffirmed that "by its plain terms ... the NLRA confers rights only on ***employees***, not on unions or their nonemployee organizers." (emphasis in original). The Court ordered the Board to dismiss charges based solely upon alleged employer interference with non-employee unions, in the context of handbilling and picketing.

Since the Supreme Court's decision in ***Lechmere***, the Board and appellate courts have generally adhered to the Court's holding, outside the context of state court litigation, refusing to find unfair labor practices against employers based upon charges brought solely on behalf of non-employee labor organizations. ***See Makro, Inc.***, 316 NLRB 1160 (1995), ***enf'd***, 74 F. 3d 292 (D.C. Cir. 1996); ***see also NLRB v. Great Scot, Inc.***, 39 F. 3d 678, 682 (6th Cir. 1994); ***Sparks Nugget, Inc. v. NLRB***, 968 F. 2d 991 (9th Cir. 1992)

Similarly, in its interpretation of the Supreme Court's holding in ***Bill Johnson's Restaurants v. NLRB***, 461 U.S. 731 (1983), the NLRB has until recently confined its findings of unfair labor practices to retaliatory employer lawsuits against employees. ***See Montgomery Ward Co.***, 288 NLRB

126, 195 (1988)("[In] the cases where the Board has awarded litigation expenses for civil or criminal court proceedings resulting from an employer's unlawful conduct, such awards have uniformly been given to employees. None of the cases involve non-employee union representatives.").

Certainly, nothing in the ***Bill Johnson's*** case itself authorizes the Board to find a violation of Section 8(a)(1) arising out of a lawsuit against a union which does not represent or act on behalf of the litigating employer's employees. In ***Bill Johnson's***, the employer filed suit against several of its *own employees* for libel and mass picketing. The Court repeatedly stated in its holding that the purpose of the decision was to protect largely defenseless employees against the coercion inherent in baseless and retaliatory litigation. Unions, on the other hand, in addition to being unprotected by Section 7 of the Act, are quite capable of defending themselves and are frequent litigants in court. They are in need of no special privileges under the NLRA with regard to attorneys fees.

Since ***Bill Johnson's Restaurants***, those NLRB cases applying its doctrine to defendant unions have almost always arisen in the context of the unions' representation of the litigating employers' own employees, or have involved lawsuits which the Board could at least argue were indirectly aimed at employees. Thus, in ***Diamond Walnut Growers***, 312 NLRB 61, *enf'd*, 53 F. 3d, 1085, 1087-90 (9th Cir. 1995), the union which was sued by an employer in fact represented the employer's employees and was engaged in a strike against the employer on behalf of those same employees. It was only in this far different context that the Board and the Court of Appeals held that a suit against that union violated the Act, because the suit really was directed against the employees themselves.

This distinction was made clear in the Ninth Circuit's opinion as follows:

> The Board does not contend that the lawsuit violated the Union's Section 7 rights, but rather maintains that, by suing the Union Diamond interfered with *its employees'* exercise of their Section 7 rights. (emphasis added).
>
> * * *
>
> *While not all suits against unions interfere with the employees' exercise of their Section 7 rights*, we agree with the Board that under the circumstances here, Diamond's punitive damages suit against the Union did. (emphasis added).
>
> * * *
>
> Filing *this lawsuit* ... had an inevitable impact on *the employees who were exercising their Section 7 right to strike.* (emphasis added).

53 F. 3d at 1089-90.

The Ninth Circuit clearly acknowledged this Court's holding in ***Lechmere, supra***, and carefully limited the types of litigation against unions which could properly be the focus of a ***Bill Johnson's*** type unfair labor practice case. By contrast, in the present case, nothing about Geske's lawsuit against the Unions had an "inevitable impact" on the exercise of Section 7 rights by any employees of Geske. The Seventh Circuit's broad opinion clearly creates a conflict with that of the Ninth Circuit by placing no restrictions whatever upon the Board's right to impose liability on an employer for suing a union.

A similar direct conflict exists between the present case and the Sixth Circuit's holding in ***Johnson & Hardin Co. v. NLRB***, 49 F. 3d 237, 244 (6th Cir. 1995). In ***Johnson & Hardin***, the Sixth Circuit squarely held that it was improper to award attorneys fees to an outside labor organization which had successfully defended against an employer's trespass action in state court.

The court rightly referred to the award of attorneys fees as a "harsh remedy" and found it to be unjustified under the NLRA.

The Seventh Circuit improperly dismissed the *Johnson & Hardin* opinion for its "brevity" but gave no rational basis for distinguishing the Sixth Circuit's holding. The Sixth Circuit's decision was grounded in the plain language of *Bill Johnson's* itself. Underlying the court's holding was the recognition of the completely different circumstances between labor unions as court defendants, and individual employees, particularly where the unions are not acting as the employees' representatives.[1]

The Sixth Circuit in *Johnson & Hardin* correctly identified the standard which should be applied to attorneys fees demands by outside labor organizations, and which had previously been applied by the NLRB and the courts until recently. Specifically, attorneys fees should only be awarded to a defendant in unfair labor practice litigation when there has been a "clear and flagrant violation of the law" such that the award of attorneys fees is necessary to "discourage future frivolous litigation." Such was the holding of *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), *enf'd as mod., Intl. Union of Elec., Radio, and Mach. Workers, AFL-CIO v. NLRB*, 502 F. 2d 349 (D.C. Cir.) *cert den.*, 417 U.S. 921 (1974); *see also Lang Towing, Inc.*, 201 NLRB 629 (1973).

The Seventh Circuit's holding conflicts directly with this previous standard for the award of attorneys fees by transforming such awards from extraordinary circumstances to ordinary occurrences. As a result, the First Amendment rights

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[1] The case of *Gibson Greetings, Inc. v. NLRB*, 53 F. 3d 385, 394 (D.C. Cir. 1995), cited by the Seventh Circuit, does not support the proposition that *Bill Johnson's* authorizes unfair labor practice findings against employers who sue "stranger" labor organizations. The union who successfully defended itself in *Gibson Greetings* was the representative of the employer's employees, who won an action under Section 301. Even so, the union was denied any attorneys fees by the D.C. Circuit.

of employers to seek redress in the courts against union misconduct is being chilled.

The chilling of employer rights is exacerbated here, and an additional conflict created, because the decisions below have replaced the "sham" pleading standard of ***Bill Johnson's*** with a new "likelihood of success" test, contrary to the instructions of this Court. ***See*** Geske Petition at 10-19. As this Court most recently held in ***Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.***, 508 U.S. 49 (1993), ***Bill Johnson's*** was intended only to bar employers, like those seeking First Amendment protection under the antitrust laws, from filing suits which are "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."

See also USS Posco v. Contra Costa County Bldg. & Constr. Trades Council, 31 F. 3d 800, 804 (9th Cir. 1994)(denying attorneys fees to union under antitrust laws and referencing ***Bill Johnson's*** standard); and ***Brown & Root, Inc. v. Louisiana State AFL-CIO***, 10 F. 3d 316, 325 (5th Cir. 1994). In the present case, the Seventh Circuit permitted the NLRB to engage in its own factfinding determinations, with 20/20 hindsight, to find that Geske's good faith litigation in defense of its business constituted an unfair labor practice.

Amicus ABC and others in the business community are alarmed at the NLRB's expansion of ***Bill Johnson's Restaurants*** into a weapon for unions, as opposed to a protection for employees. As has been widely documented, unions have in recent years increased their reliance on pressure tactics which are beyond the scope of the National Labor Relations Act, and which can only be redressed through the courts. Such tactics have included "corporate campaigns," trade libel, "salting," violence, and other forms of civil conspiracies, and have often been undertaken by well financed outside labor organizations, without participation or support by employees. ***See*** Northrup, *Construction Union Programs to Regain Jobs: Background*

and Overview, XVIII Jnl. of Lab. Res. 1 (1997); ***See also*** *"Labor's New Assault,"* Nation's Business 16 (June 1997).

Employers must be permitted to defend their businesses in court without the added burden of having to pay the attorneys fees of a defendant labor union whose financial resources may exceed those of the employer. The Seventh Circuit and the NLRB have ignored both the First Amendment and the realities of the workplace, as well as this Court's decisions in ***Lechmere*** and ***Bill Johnson's***, in reaching the wrong result.

CONCLUSION

The Court's intervention is urgently needed to prevent the transformation of ***Bill Johnson's Restaurants v. NLRB*** into a punitive device giving an unwarranted advantage to litigants who are in need of no such special protection, i.e., outside labor organizations. The writ should be granted so that the decision of the Seventh Circuit and the NLRB can be reversed.

Respectfully submitted,

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